

Roger Ayer



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: J.A. Walker Company, Inc.; James A. Walker,
d/b/a J.A. Walker Company

File: B-236518

Date: November 17, 1989

DIGEST

A bid bond is defective and its accompanying bid is properly rejected as nonresponsive when the bid is submitted in the name of a corporation, albeit certified as operating as a "joint venture," and the accompanying bid bond names as principal a joint venture consisting of the corporation named in the bid and a sole proprietorship, since the surety's liability to the government under the bond issued to the joint venture is unclear in the event of the corporate bidder's default.

DECISION

J.A. Walker Company, Inc., and James A. Walker, d/b/a J.A. Walker Company, protest the rejection of the bid submitted in the corporate name under invitation for bids (IFB) No. DACA45-89-B-0114, issued by the United States Army Corps of Engineers, Omaha District, Omaha, Nebraska, for construction of building additions to a power plant and a chiller plant. The bid was rejected as nonresponsive because the bidder named on the bid (a corporation) was not the same as the principal named on the bid bond (a joint venture consisting of the corporation named in the bid and a sole proprietorship). We deny the protest.

In 1976, James A. Walker, a Denver-based minority contractor, established a sole proprietorship general construction company trading under the name of J.A. Walker Company. In 1987, Mr. Walker incorporated J.A. Walker Company, Inc., and began transferring assets from the sole proprietorship to the corporation. The transfer, which was never completed, resulted in the corporation having more assets than the sole proprietorship. Mr. Walker controls both firms, and the two firms use the same personnel, office space, and telephone numbers. Mr. Walker maintains that he operates the sole proprietorship and the corporation as "a combined entity or

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joint venture in order to utilize the assets of both in the performance of his contracting obligations."

The IFB required each bidder to submit with its bid a bid bond. The solicitation cautioned that failure to furnish a bid bond in the proper form might be cause for rejection of the bid. See Federal Acquisition Regulation (FAR) § 28.101-4. The Walker bid listed a single legal entity--the corporation, "J.A. Walker Company, Inc."--as the bidder and was signed by Mr. Walker, without a corporate title. Although "joint venture" was checked as the type of business organization in the certification section of the bid, no joint venturer was named on the bid. The accompanying bid bond listed as principal two legal entities--the corporation, listed as "J.A. Walker & Company, Inc.,"^{1/} and the sole proprietorship, "J.A. Walker Company"--and joint venture was checked as the type of business organization. Mr. Walker signed the bid bond twice in his respective capacities as president of the corporation and owner of the sole proprietorship. The agency rejected the Walker bid, the apparent low bid as nonresponsive upon discovering the discrepancy between the legal entity named on the bid and the legal entity named on the bid bond.

The crux of the protesters' argument is twofold: (1) the failure to include the name of the purported second joint venturer on the bid form is a waivable minor informality; and (2) the defect in the bid is not such that the government would lose the security afforded by the bid bond, since the courts would hold the surety liable in the event that the government had to default the named corporate bidder.^{2/}

The purpose of the bid bond is to provide funds with which to cover the government's cost of awarding to the next-high bidder in the event that the awardee fails to execute a written contract and provide required bonds within the time specified for acceptance. In such circumstances, the defaulted bidder is liable to the government for the cost of acquiring the work that exceeds the amount of the defaulted bidder's bid. Since the bidder may lack sufficient funds to meet its liability, the bid bond provides a source of funds

1/ In the articles of incorporation the corporate name is listed as "J.A. Walker Company, Inc."

2/ Initially, the protester also argued that the corporation and the sole proprietorship were the same legal entity. The protester abandoned this argument after a bid protest conference at our Office.

against which the government can offset its damages by making a third party surety liable up to the face amount of the bond. See FAR § 52.228-1(e); Hydro-Dredge Corp., B-214408, Apr. 9, 1984, 84-1 CPD ¶ 400. Consequently, the bid bond's sufficiency depends upon whether the surety is clearly bound by its terms; when the liability of the surety is not clear, the bond is defective. Id.

When required, a bid bond is a material part of a bid that a contracting officer cannot waive. See 52 Comp. Gen. 223 (1972); Atlas Contractors, Inc./Norman T. Hardee, a Joint Venture, B-208332, Jan. 19, 1983, 83-1 CPD ¶ 69. When a bidder furnishes a defective bond, the accompanying bid itself is rendered defective and must be rejected as nonresponsive. Truesdale Constr. Co., Inc., B-213094, Nov. 18, 1983, 83-2 CPD ¶ 591. A bid bond which names a principal different from the bidder named in the accompanying bid is deficient and the defect may not be waived as a minor informality. A.D. Roe Co., Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD ¶ 194; H & N Elec., Inc., and Buck's Electric, Inc., B-224024, Dec. 29, 1986, 86-2 CPD ¶ 718. As with other matters relating to the responsiveness of a bid, the determination as to whether a bid bond is acceptable must be based solely on the bid documents themselves as they appear at the time of bid opening. Allen County Builders Supply, 64 Comp. Gen. 505 (1985), 85-1 CPD ¶ 507.

The protesters contend that the failure to include the name of the sole proprietorship as a member of the joint venture on the bid is a minor informality analogous to situations where bidders fail to sign as principal on the bid bond, since in both instances the deficient document is accompanied by a document with the required information. In this regard, the protesters cite Geronimo Serv. Co., B-209613, Feb. 7, 1983, 83-1 CPD ¶ 130, as an example of the waiver which they seek. In Geronimo, we held that the contracting agency properly waived a principal's failure to sign a bid bond where the bid bond was accompanied by a signed bid. The protesters urge that the government should likewise waive its omission of the name of the second joint venturer from the bid since the second joint venturer's identity and intent to be bound can be discerned from its name and signature on the accompanying bid bond. The protesters further urge that the government's interest is protected because the government gained access to the unnamed sole proprietorship's assets when Mr. Walker signed the bid without inserting his corporate title, since Mr. Walker's assets and the sole proprietorship's assets are one and the same.

We disagree. Typically in missing signature cases, the typed name of the legal entity/principal appears over the bid bond's empty signature block, and the name of the same legal entity also appears on the bid as the bidder with an accompanying signature. Here, the name of the sole proprietorship appears only on the bid bond and there is nothing to tie it as a legal entity to the bid since it is not mentioned or referenced in any way in the bid or any accompanying documents save the bid bond. Consequently, the reasoning behind the missing signature cases is inapposite to the instant protest. In addition, since the focus of the inquiry is the liability of the surety under the bond and not the government's ability to tap the sole proprietorship's assets, we think it irrelevant that Mr. Walker's signature on the bid may render the sole proprietorship's assets available to the government in the event of a default termination of the award.

Although the protesters assert that their intention was to submit a bid that conformed to their bid bond, it is not the bidder's intent which controls. The relevant inquiry, rather, is whether the surety's obligation has been objectively manifested on the bidding documents so that the extent and character of its liability is clearly ascertainable therefrom. See Hydro-Dredge Corp., B-214408, supra. Here, we find that the requisite obligation was not clearly created.

The protesters also argue that Colorado^{3/} courts would hold the surety liable even where the bid named only one of the two joint venturers because the surety prepared the bond and obviously intended to bond a joint venture consisting of a corporation and a sole proprietorship for the named construction project. According to the protesters, in Colorado the liability of principals is joint and several "and an award of damages against one principal is sufficient to hold the surety." In the protesters' view, our Office has unreasonably extended the principle referenced in A.D. Roe Co., Inc., 54 Comp. Gen., supra, that "a surety under a bond in the name of several principles is not liable for the default of one of them."

In our view, it is not clear whether the surety was legally binding itself to incur the liability of the corporation acting alone when it issued the bond in the name of the

^{3/} The protesters maintain that Colorado case law would govern any dispute as to the surety's liability in this case because the surety is licensed in Colorado, the protesters reside there, and the project is to be performed there.

joint venture. The bid bond specifically conditions the surety's liability on the assumption that "[t]he Principal has submitted the bid identified above." We do not think that this condition is met where the bid is submitted by a corporate entity and the principal on the bid bond is a distinct legal entity (a joint venture) consisting of the corporate bidder and a sole proprietorship that did not submit the bid and cannot be tied to the bid. At bid opening there was no clear evidence that the bid was intended to be that of a joint venture. Had evidence existed to tie the joint venture to the bid, our view of the matter would be different. For example, we have held a bid responsive notwithstanding the submission of a bid bond naming two firms as principal and one of the two firms as bidder when the bid was accompanied by a third document entitled "Certification of Joint Venture With Parent Co." which clearly expressed the intention and agreement of the two affiliated companies to submit a joint bid under the subject invitation and contained the names of the individuals authorized to bid the joint venture, one of whom signed the bid. B-169369, Apr. 7, 1970.

In support of their position, the protesters observe that a district court declined to follow our determination in a similar case, B-170361, July 27, 1970, where an agency had requested an advance decision as to the sufficiency of a bid bond. There, the bid named a corporation and contained no evidence that it was the bid of a joint venture, while the bid bond named as principal a corporation/individual joint venture. Although we found the bid was nonresponsive and so advised the agency, the United States District Court for the Western District of Oklahoma ordered the government after bid opening to accept a new and adequate bond that had been tendered by the bidder's surety and to award the contract to the rejected bidder. Blount-Barfell-Dennehy, Inc. v. United States, No. Civ. 70-392 (W.D. Okla. filed Aug. 6, 1970). Since, to our knowledge, no decision was published in the case, we are unable to analyze the court's rationale. In our view, a sole court's order unsupported by any documented analysis does not require us to abandon our long-standing precedent and find the bid bond acceptable in this case.

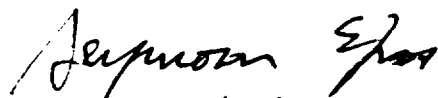
In view of the above, we think the contracting officer reasonably concluded on the basis of prior decisions of our Office that the surety's liability under the bid bond was subject to question and that the government might not receive the protection to which it was entitled under a bond issued to an entity other than the bidder named on the bid.

Andersen Constr. Co.; Rapp Constructors, Inc., 63 Comp. Gen. 248 (1984), 84-1 CPD ¶ 279. With regard to the protesters' contention that the courts would find the surety liable for the corporate bidder's actions, the contracting agency is not required to assume the risk of litigation to enforce its rights when the surety's liability is unclear. Accordingly, we conclude that the bid bond was defective here, and that the agency properly rejected the bid as nonresponsive.

The protesters also contend that the bid should be accepted on various public policy grounds; for example, the protesters argue that acceptance of the bid would be consistent with the goal of fostering participation by minority contractors in government procurements. Given our finding that the bond was defective and the bid nonresponsive, if we, as the protesters argue, recommended acceptance of the bid, we in effect would be waiving the requirement that the bid be responsive; there simply is no legal basis which would allow us to make such a recommendation.

Finally, in their comments on the agency report, the protesters request that we consider the relief available under Pub. L. No. 85-804, 50 U.S.C. §§ 1431-1435 (1982), which empowers the President of the United States to authorize contracting agencies to enter into, amend or modify contracts when such action would facilitate the national defense. See FAR § 50.101(a). The decision whether to grant the extraordinary contractual relief available under the statute is vested in the contracting agency, not our Office. See 52 Comp. Gen. 534 (1973).

The protest is denied.

for 
James F. Hinchman
General Counsel